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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 6th January 1958

S.R.O. 171.—Whereas the election of Shri Raj Bahadur, as a member of the Lok Sabha from the Bharatpur Parliamentary Constituency of that Sabha was called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (43 of 1951), by Shri Hotilal, son of Shri Kallan Singh, M.L.A., Pleader, Bharatpur, Rajasthan;

And whereas the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act, for the trial of the said petition, has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order in the said election petition to the Commission;

Now, therefore, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

BEFORE SHRI KARTAR SINGH CAMPBELLPURI, MEMBER, ELECTION TRIBUNAL, JAIPUR

ELECTION PETITION No. 427 OF 1957

Shri Hotilal, son of Shri Kallan Singh, M.L.A., Pleader, Bharatpur—*Petitioner*

Versus

Shri Raj Bahadur, Minister of State in the Ministry for Transport & Communication, 9, Akbar Road, New Delhi.—*Respondent.*

APPEARANCE: Shri R. C. Sharma, Advocate, assisted by Shri Umesh Chandra Swami *for the petitioner.*

Shri K. L. Mishra, Advocate, assisted by Shri C. L. Agarwal, Shri J. J. Shukla, Shri B. P. Tyagi, Shri A. S. Chaturvedi and Shri B. L. Baid *for the respondent.*

JUDGMENT

In this petition, the nomination paper of Shri Mukat Behari Lal *alias* Shri Mukat was rejected by the Returning Officer, who passed the following order while rejecting the same.

'N'omination No. A/15, A/16 and A/17 filed by M/s. Gauri Shanker, Ram Charan and Sujan Singh proposing the name of Sri Mukat for the Bharatpur Parliamentary constituency were considered—

The following objections raised:—

1. By Sri Ram Swaroop, Election Agent of Sri Raj Bahadur to the effect that Shri Mukat is a legal Adviser to the Municipal Board, Bharatpur and thus holds office of profit in the meaning of article 191 of the Constitution of India and is thus disqualified to stand for the Parliament.

Shri Mukat produced a letter dated 28th January, 1957 from the Chairman, Municipal Board, Bharatpur, that his resignation from the office of the Legal Adviser has been accepted with effect from 28th January, 1957. I accept this and reject the objection of Sri Ram Swaroop.

2. That Shri Mukat is an Oath Commissioner for Civil Court, Bharatpur. He should, therefore, be considered to hold an office of profit under the State Government.

It was argued on behalf of Shri Mukat that according to section 9 of the Representation of the Peoples Act 1951 an office of profit under the State Government is not an office of profit under an appropriate Government with reference to a seat in the Parliament.

I have considered the arguments for and against the objection. According to section 102 of the Constitution of India. a person shall be disqualified for being chosen as a member either of the House of the Parliament if he holds any office of profit under the Government of India or the Government of any State. According to this article of the Constitution, holding an office of profit under the State Government of Rajasthan will be considered a disqualification for being chosen a member of the Lok Sabha. Office of Oath Commissioner which Shri Mukat holds, is under the High Court and according to article 214 of the Constitution the High Court of a particular State is a part of the State Government. Even if it were not and were to be considered under the Central Government, the Oath Commissioner appointed by the High Court of Rajasthan would be considered to be an office of profit under an appropriate Government with reference to a seat in the Lok Sabha.

I therefore, hold that Shri Mukat holds an office of profit under an appropriate Government and his Nomination paper numbering A/15, A/16 and A/17 are rejected on this account. Copies of this order shall be attached to each of the nomination papers hereby rejected.

(Sd.) VISHNU DUTT SHARMA, I.A.S.
Returning Officer, Bharatpur Parliamentary Constituency,
1st February, 1957".

Shri Mukat however did not choose to agitate the matter by any election petition, but Sri Hotilal son of Shri Kallan Singh, Pleader, Bharatpur, who is an elector in Bharatpur Parliamentary Constituency, has presented this petition to question the election of Shri Raj Bahadur, who was the successful candidate and was returned from the Bharatpur Parliamentary Constituency. Shri Mukat had filed three nomination papers and the scrutiny of the nomination papers for the said constituency took place on 1st February, 1957. All the three nomination papers of Shri Mukat were rejected by the Returning Officer on the ground that Shri Mukat having been an Oath Commissioner for Civil Courts was holding an office of profit, and was therefore, disqualified to stand for the election of the said constituency as borne out by the order of the Returning Officer reproduced above. It will be seen that one of the objections raised by the respondent before the Returning Officer namely Shri Mukat was the legal Adviser to the Municipal Board, Bharatpur, was rejected by the Returning Officer and does not form the subject of the petition. The allegations of the petitioner in the petition are to the effect that the rejection of the nomination papers of Shri Mukat was improper in as much as (a) that an Oath Commissioner does not hold any office of profit either under the Government of India or the Government of State and as such was not disqualified for filing the nomination paper for the House of People (b) that Shri Mukat, although was appointed an Oath Commissioner by the District

Judge, Bharatpur, yet the appointment was subject to his giving an undertaking to the effect that the oath commissioners will so adjust their timings that at least one of them will be present during court hours for verifications of affidavits and that this undertaking was not given by Shri Mukat by 1st February, 1957, the date for the scrutiny of the nomination papers. And as such Shri Mukat could not be regarded to have been appointed as an oath commissioner at the time of scrutiny even if the office of the oath commissioner be an office of profit.

The election of the respondent was also challenged on the ground that Shri Hansraj, one of the candidates, having filed his nomination paper for the said constituency retired from the contest after giving notice of retirement to the Returning Officer on 15th February, 1957, and the Returning Officer had committed an illegality in non-complying with the provisions of section 55 A of the Representation of the People Act and the rules made thereunder. It was alleged *inter alia* that under the provisions of section 55A of the Representation of the People Act, the last date for retirement was 14th February, 1957 and as Shri Hansraj had delivered the notice of retirement to the Returning Officer on 15th February, 1957, he could not be deemed to have retired from the contest as contemplated under section 55A of the Representation of the People Act. Finally it was asserted in the petition that the result of the election had been materially affected on account of the non-compliance with the provisions of section 55A of the Representation of the People and that the election to the Bharatpur Parliamentary Constituency was void.

The petition was resisted by the respondent and the allegations made by the petitioner in relation to Shri Mukat as well as Shri Hansraj adumbrated above were denied in the written statement. It was further more urged in the additional pleas of the written statement that Shri Mukat was appointed as an Oath Commissioner along with three other legal practitioners for the year 1957 and having accepted the office, he actually verified several affidavits before the date of filing his nomination papers. With regard to the retirement of Shri Hansraj from the contest it was submitted that the same was valid both in law and facts, and it did not materially affect the result of the election. A preliminary objection was also raised in the penultimate paragraph of the written statement that the petition was not accompanied by a Government Treasury receipt for the deposit of Rs. 1,000 and the one filed with the petition could not be held to be proper representation of the deposit within the meaning of section 117 of the Representation of the People Act.

At the time of framing the issues Mr. Chiranjilal Agarwal, learned counsel for the respondent, however, on the inspection of the receipt of security deposit placed on the record, gave up the preliminary objection and no issue was, therefore, framed on this point initially.

The following issues were struck:—

ISSUES

1. Whether the Nomination paper of Shri Mukat was improperly and illegally rejected by the Returning Officer inasmuch as—

(a) that the office of the oath commissioner did not constitute an office of profit either under the Government of India or Government of State and as such Shri Mukat did not incur any disqualification under aticle 102 of the Constitution of India read with section 7 of the Representation of the People Act.

(b) that Shri Mukat was not performing the duties of the office of the Oath Commissioner having not given the requisite undertaking in relation to the adjustment of timings of affidavit.

(On Petitioner)

2. If issue No. 1 is proved whether the result of the Election has not been materially affected.

(On respondent)

3. Whether the notice of retirement given by Sri Hansraj on 15th February, 1957 was not valid under the provisions of section 55A of the Representation of the People Act? because

(a) the first polling of the constituency took place on 25th February 1957.

(b) the Returning Officer should have provided ballot boxes for the said candidate on the polling booths.

4. In case the notice of retirement is proved to be invalid, what is its effect in law (amended by order dated 13th August, 1957).

5. Whether about 10 to 16 thousands voters came to vote for Sri Hansraj and voted for the returned candidate namely respondent No. 1 as alleged by the petitioner and thus the result of the election was materially affected?

(On Petitioner)

It however so transpired that on the day, when the petitioner's evidence was to be recorded, the respondent again raised the objection in regard to non-deposit of security amount, which had been once given up as said above. It was contended that on the inspection of the receipt more closely it was found that the same was in the form of a cash challan and not a receipt for the deposit of security amount and as such the requirements of section 117 of the Representation of the People Act were not satisfied. It was felt that the objection had already been given up, but the respondent's counsel filed an application setting out his reasons for posing the objection afresh. It was asserted that the provisions of section 117 of the Representation of the People Act are mandatory and the admission of the counsel at one time on a point of law was not a bar in raising the objection once again. The Tribunal in these circumstances deemed it proper to give an opportunity to the parties to thrash out this legal objection and the following issue was framed.

"6—Whether the cash Challan already on the record does not amount to receipt and as such does not satisfy the requirements of section 117 of the Representation of the People Act?"

(On respondent)

The learned counsel for the respondent asked time for adducing evidence on this issue and the case was adjourned for resolving the controversy on the preliminary issue in the first instance by adducing evidence. This naturally protracted the proceedings for some time but the respondent did not produce any evidence on this issue in respect of the receipt of security deposit and stated that the issue was more or less one of law and was to be argued. He furthermore refrained from addressing the argument also at that stage of the case and pleaded that it would be better if this issue be also decided along with otner issues upon which not much evidence was likely to be adduced.

At any rate the preliminary issue was not argued and the case was posted for the evidence of the parties for 15th October 1957. On this date, the petitioner in support of his allegations made in the petition, came into the witness box as his own witness and also examined one formal witness, who was summoned for the production of some files relating to the appointment of oath commissioners. Shri Mukat Beharilal *alias* Shri Mukat was also summoned by the petitioner, but it so happened that he was given up and was examined as a courtwitness.

The respondent in rebuttal also came into the witness box and examined three more witnesses, one for the production of files from the courts of District Judge and Civil Judge, Bharatpur and two others Shri Dharam Gopal Chaturvedi, another oath commissioner and Sri Ram Swaroop, his agent. Reliance was also placed upon the documentary evidence of various files, which were tendered in evidence.

FINDINGS

Issue No. 6.—As said above this issue was framed at the later stage of the proceedings, but being a preliminary issue is to be taken up at the outset. The issue arose out of the facts and circumstances contained in the application (10A) filed on 3rd September 1957 wherein the objection was re-agitated on the following grounds:—

1. That the respondent's counsel had received the information that no money appears to have been deposited by the petitioner in the Government Treasury and there could be no receipt. (Quoted from paragraph 3 of the application).

2. That on further scrutiny of the triplicate cash challan it has been found that it is not a Treasury receipt at all and that it is only a memorandum challan which is prepared for the deposit of the money in the Treasury. It does not show that any amount was received in the Government Treasury. (Quoted from paragraph 4 of the application).

3. that the copy of the triplicate challan shows that the challan was only prepared, but no amount of money was deposited with the Bank and the Triplicate Challan does not contain various initials that are necessary when the payment is made and that it only contains directions to the effect that payment may be received and a receipt may be granted. (Quoted from paragraph 6 of the application)

4. that under section 117 of the R.P. Act it is mandatory for the petitioner to enclose with the petition a Treasury Receipt showing that a sum of Rs. 1,000 has been made by him in the Treasury or a Bank (Bank of Jaipur in this case) in favour of the Secretary of the Law Commission. (Quoted from paragraph 7 of the application).

5. that the document produced by the petitioner is open to another serious objection that it does not show in what matter the amount has been deposited, if deposited at all. (Quoted from paragraph 11 of the application).

The petitioner filed an affidavit on 21st September, 1957 to the effect that Rs. 1,000 were deposited as security amount in connection with the aforesaid election petition ,(427 of 1957) in the Bank of Jaipur Ltd., Bharatpur Branch on 1st May, 1957 and that he was given the receipt for Rs. 1,000 by the said bank, which was submitted to the Election Commission with the petition. This affidavit was not repudiated by any counter affidavit and C. L. Agarwal learned counsel for the respondent made a statement in court that the respondent did not propose to file any counter affidavit to the affidavit filed by the petitioner.

The learned Advocate General, who argued the case at the final stage on behalf of the respondent appears to have taken note of the affidavit made and while arguing did not press the point that Rs. 1,000 were not deposited in the Treasury as alleged in the application filed on 3rd September, 1957. He also did not press the objection taken in the same application that the memorandum or challan was the preparatory challan for the deposit of the amount. The counsel also frankly admitted that there is no other form of receipt and the memorandum or Challan is the only receipt, which is issued by the Treasury or Bank in respect of the deposit of the amount. His onslaught accordingly was not on the non-deposit of the amount of Rs. 1,000, but that the receipt was not a proper receipt in as much as the petitioner failed in getting a proper receipt. It would be in this perspective that the point is to be resolved. The issue reads as follows:—

"Whether the cash Challan already on the record does not amount to receipt and as such does not satisfy the requirements of section 117 of the R.P. Act?

Sri K. L. Mishra, learned Advocate General urged in this connection that the provision embodied in section 117 of the Representation of the People Act is mandatory and entails the penalty of dismissal as laid down under section 90(3) of the Act, in case the requirements of the section are not satisfied. It was stressed that if this provision was not complied with, the Election Commission was bound to dismiss the petition under section 85 and similarly the Tribunal was bound to dismiss the same under section 90(3) of the Representation of the People Act, if it was not duly considered by the Election Commission at the time of presentation of the petition. Reliance was placed on a decision in the case of Shiv Narain Vaid *Versus* Sardarmal Lalvani, reported in 4 E.L.R. page 401. In this case the receipt of security deposit filed with the petition was not in favour of the Secretary of the Election Commission and this defect was pointed out by the Election Commission to the petitioner and production of a proper receipt was asked for, which was filed by the petitioner after the period of limitation for filing the petition and it was held that the Election Commission had no power to condone the default and to receive a proper treasury receipt after the period of limitation had expired.

Coming to the receipt in question itself, Shri K. L. Mishra, learned Advocate for the respondent carried the Tribunal into various articles of the Treasury Manual of Government of Rajasthan 1952 and specific reference was made to articles 85 to 89 which deal with the memorandum or Challan. The procedure laid down in the Manual was not questioned by the other side and as such it is not necessary to reproduce or give the sum and substance of this procedure. Moreover when we came to brass-tacks of the question involved as to whether this procedure was rightly adapted and observed in the case of this deposit, Sri K. L. Mishra split the memorandum or Challan into three parts and applying the procedure envisaged in the articles of the Treasury Manual contended that so far part (1) is concerned it need not be disputed while part (3), which relates to the Bank was left unfilled in this Challan. The controversy accordingly centres round part (2). It was at the same time admitted that if the Bank had not filled part No. 3 of the Memorandum of Challan which was assigned for the Bank, it does not make any difference if the Bank had utilised part (2). It may be reiterated along with this that Shri K. L. Mishra also admitted that there was no other form of receipt excepting the one the Memorandum or Challan, which is generally used and has been used in this deposit. Now part (2) as borne out by the Memorandum or Challan in question contains four writings made at different stages. The one writing engraved in a seal is "Correct-Treasury Clerk 1/5 with his initials. The second seal engraved in a seal reads "Bank of Jaipur Ltd. Bharatpur—Please receive and grant Receipt—Accountant—Treasury with initials 1st May, 1957"

Correct
Sd. .....
1/5
Treasury Clerk.

Bank of Jaipur Ltd., Bharatpur.
Please receive and grant receipt.
(Sd.) Illegible,
Accountant.
Treasury.....
1/5/57.

The third writing is engraved in a seal affixed on the boundary line of part one and part (2), which reads "The Bank of of Jaipur Ltd., Bharatpur. 1 May 1957 Received".

The Bank of Jaipur Ltd.
Bharatpur
1 May 1957
RECEIVED.

This seal is crossed in pen writing in red ink Rupees one thousand only with initials. The fourth writing is not enclosed, but is a seal with the words "The Bank of Jaipur Ltd." with initial in red ink.

Now the contenton of Sri K. L. Mishra is that the writing in red ink "Rupees one thousand" is meant for column No. 2, which is meant for the Treasury officer and the seal of the Bank with the word "Received" has neither been initialled nor bears the words "Rupees one thousand" and as such the requirements have not been complied with and although money may have been deposited, the receipt was not a proper receipt. The learned Advocate General urged that it was here that the petitioner, who happened to be a lawyer also, had failed to get a proper receipt. It was however conveniently forgotten that the filling of column No. 2 was not necessary in case when the money was to be received by the Bank, because column No. 2 is meant for non-Banking Treasury and Sub/Treasury. That column according to the directions was to be filled up by the Treasury and in this case the bank has utilised this column and there is no objection that the Bank was confined to third part only. The seal of the word "RECEIVED" again is crossed by red ink writing "Rupees one thousand" with initials. This manifestly goes to show that when the memorandum was presented it was sealed by the word "Correct" by the Treasury Clerk and then by Sub-Treasury Officer "Please receive and grant receipt", which apparently is a direction to the Bank where the money was to be deposited. The bank accordingly received the money and the amount of Rupees one thousand touches the seal straightaway and is initialled. Furthermore, the seal of the Bank of Jaipur Ltd. was also affixed and initialled. This amply satisfies the procedure laid down in the Manual in the usual form. At any rate even if the procedure was not followed more implicitely, it was for the Treasury and Bank and the petitioner had no control or authority over them as to what procedure was to be followed. In the absence of any other form of receipt the

The Bank of Jaipur Ltd.
Sd.
Agent.

memorandum or Challan issued is a receipt, which was issued to the petitioner and it is not intelligible as to where the petitioner had failed to comply with the procedure of deposit of money in the Bank.

The other objection levelled against the receipt was that the petitioner had failed to show in the receipt itself that the amount of deposit was meant for the petition namely "Hotilal *versus* Raj Bahadur". In this context Shri K. L. Mishra contended that the provisions of section 117 of the Representation of the People Act are mandatory, and it is the strict compliance with the words of the section that makes the receipt proper. Reference was made to the observations made at page 237 in the Case of 'Hari Vishnu *versus* Ahmad Ishaque' by the Supreme Court reported in 10 E.L.R., page 216. This observation is to the effect that the practical bearing of the distinction between a provision which is mandatory and which is directly is that while the former must be strictly ovserved in the case of the latter it is sufficient that it is substantially complied with."

The argument precisely was that under section 117 of the Representation of the People Act, the requirements are that the petitioner shall enclose with the petition a Government Treasury Receipt showing (a) that a deposit of one thousand rupees had been made by him either in a Government Treasury or in the Reserve Bank of India, (b) that it is in the name of the Secretary Election Commission and (c) as security for the costs of the petition. It was urged that in part (c) the word "the" is significant and the name of the constituency should have been mentioned.

Now section 117 of the Representation of the People Act reads as follows:—

> "Deposit of security.—The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition."

It will be seen that the primary requirement is filing of a Treasury receipt and it is ordained that it must show a deposit of Rs. 1,000/- and it should be in the name of the Secretary of the Election Commission. The last words "as security for the costs of the petition" appear to convey the object of the deposit. Shri K. L. Mishra laid emphasis on the word "the" and submitted that the receipt does not show as to whether it was meant for this petition or for any other petition to be filed challenging the election of any assembly seat or Parliamentary seat. It was not however denied that the receipt was duly filed by the petitioner with the petition and is attached with the petition in court. The contention is that the same should have been mentioned in the receipt itself. Now the word "the" may be significant but no specific mention is made in the section that this is a part of requirements and the petition must also show the name of the respondent against whom the petition was being made. The words "as security for the costs of the petition" moreover furnish the object of the receipt and are not exactly governed by the word "showing" which covers the deposit of Rupees one thousand in favour of the Secretary of the Election Commission.

In the application filed on 3rd September 1957 the learned counsel for the respondent in paragraph 7 has also clearly stated the requirements to be complied with and these requirements mentioned in the application are that the receipt must show a deposit of Rs. 1,000/- and it should be in the name of the Secretary of the Election Commission. At any rate the hard fact is that the receipt was filed with the petition and still forms a part of the petition and in the absence of any particular direction as given in the case of the amount of deposit and the name of the Secretary; I think it is to make a fetish on the technical aspect of the question to ride roughshod over the normalcy of the human affairs. At any event I have not been able to persuade myself to fall in line with the argument advanced by the learned Advocate General on behalf of the respondent on issue No. 6 and the objection is repelled.

Issue No. 1.—In the determination of the question as to whether the post of an Oath Commissioner constitutes an office of profit either under the Government of India or Government of State in perview of section 102 of the Constitution of India, three points are to be considered:

(1) Whether it is an office?
(2) Whether it is an office of profit?
(3) Whether it is an office of profit under the Government?

Shri R. C. Sharma, learned counsel for the petitioner while arguing in respect of the contention that an Oath Commissioner does not hod any office of profit under the Government, admitted that Sri Mukat was appointed an Oath Commissioner by the District Judge and that he had acted as an Oath Commissioner for the years 1955 and 1956 and was re-appointed for the year 1957 also. It was also admitted that the remuneration in the shape of annas eight in the case of Munsif's affidavit and Re. 1/- in the case of District Judge's affidavits is to be charged for the verification of affidavits by the Oath Commissioner according to rules. The learned counsel however contended that the Oath Commissioner does not hold any office much less office of profit and even if his work constitutes an office, it is not under the Government, Central or of the State. Reference was made to section 3, sub-clauses 8 and 60 of the General Clauses Act wherein the Central Government and the State Government have been defined respectively. It was urged that the Central Government under sub-clause 8 of section 3 of the General Clauses Act means the President in relation to anything done or to be done after the commencement of the Constitution and under sub-clause 60 the State Government means the Governors in Part A States, and the Raj Pramukhs in Part B States and the Central Government in Part C States in relation to anything done or to be done after the commencement of the Constitution. It was argued that Central Government and State Government as defined under General Clauses Act when read with articles 214 and 236 of the Constitution of India which refer to High Courts in the States and the control of subordinate judiciary including the District Judges would go to show that for the purposes of Constitution the High Court exercising the jurisdiction in relation to provinces before the commencement of the Constitution and in corresponding States after the commencement of the Constitution independent body and not under the Central Government or Government of the State. The argument precisely was that the establishment of High Court was under the Constitution and it was not the creature of the Central Government. This argument was re-enforced that the legislative power to constitute a High Court belongs to the Parliament, although every Judge of the High Court shall be appointed by the President as laid down in articles 216 and 217 of the Constitution of India. It was also submitted that the removal of the High Court Judges is by a special procedure laid down under article 124 of the Constitution of India and the Central Government has no hand in it. On these lines the argument of the learned counsel for the petitioner was that the High Court is an independent body and any offices working under it cannot be called as an office under the Central Government or the Government of the State. It was next argued that Union and State are two different bodies when compared with the Government of the Union and the Government of the State and as such the disqualification for the membership of the legislature or of Parliament as contemplated under article 102 of the Constitution was not applicable to the post and the office working directly under the High Court. It was stressed that any servant under the control of the High Court cannot be called a servant under the Government of India and the words used under article 102 holding any office under the Government of India or Government of State are not applicable to Oath Commissioner appointed under the instructions of the High Court. It was further contended that the Government of India and Government of State relate to the Executive Government and do not embrace the functions of the High Court judicial as well as administrative and the underlying idea is that the legislature may not be influenced by the executive and the whole bar of disqualification is to keep the legislture beyond the influence of the executive. Reference was made to article 77 of the Constitution of India, which deals with the Government of India and article 151 of the Constitution of India, which deals with the powers of the Governor and it was concluded that the High Courts are not under direct control of the President, as a matter of fact not under the Government of India and are independent bodies. In this perspective Sri R. C. Sharma, the petitioner's counsel cited several decisions reported in Election Law Reports which are catalogued as below:—

7 E.L.R., page 294.
1 E.L.R., page 171.
10 E.L.R., page 49.
3 E.L.R., page 439.
7 E.L.R., page 203.
7 E.L.R., page 119.
7 E.L.R., page 90.
2 E.L.R., page 426.

3 E.L.R., page 117.
6 E.L.R., page 308.
8 E.L.R., page 84.
6 E.L.R., page 104.

Of the authority noted above four of these reported in 10 E.L.R., page 49, 7 E.L.R., pages 119 and 90 and 2 E.L.R., page 426 relate to the cases of assessors, two of the cases reported in 3 E.L.R., page 439 and 6 E.L.R., page 104 are of the Members of the Legislative Assembly, who were being paid fixed salary or remuneration in the course of their term of membership. One legal precedent relates to the case of an honorary Magistrate reported in 6 E.L.R., page 308 and one to the case of a teacher, who was working in a school receiving Government grant in aid reported in 7 E.L.R., page 294. Two of the cases reported in 7 E.L.R., page 203 and 3 E.L.R., page 117 relate to Lambardars. Lastly there is a case of the Vice Chancellor of the Baroda University reported in 1 E.L.R., page 171.

All these rulings were distinguished on facts by Sri K. L. Mishra, the learned counsel for the respondent in his reply. But it is desirable and convenient to understand first as to what does the word "Office" connotes and which office can be treated as an office of profit, before dialating upon the applicability of any of the rulings on the facts of the case or say in the case of an Oath Commissioner. Now it is a truism that no two cases are alike and each case is to be determined as to whether the appoinment in question is an office or office of profit on the particular facts of each case.

The word 'Office' is no where defined as to what an office should be and what an office could not be, but there are certain characteristics, which are attached with an office and the learned counsel for the respondent Sri K. L. Mishra in his arguments referred to certain features characteristics of an office namely (1) that it should be independant of the person holding it meaning thereby that the office must exist even if the person is not there, (2) that the office cannot be assignable or heritable, (3) there should be a relation of master and servant between the Government on the one hand and the person holding the office on the other and (4) it must be for specified period. In the case of an office of profit, the guiding principle obviously would be that the office of profit must have some profit attached with the office by way of salary, pay, emolument or allowance. Judged in the light on these characteristics of an office, which were not assailed by the petitioner's counsel in reply. It will be seen that an assessor, who is a public servant cannot constitute an office for the simple reason that no office exists when the assessor is out of court, where he was called to assist the Sessions Judge in the appreciation of facts of a sessions case. Further more it is the statutory duty for which every suitable citizen can be called to work as an assessor and as such it does not constitute an office. Sri K. L. Mishra while controverting the arguments of the petitioner's counsel referred to a ruling reported in 2 E.L.R., page 426 cited on behalf of the petitioner and relied on the observation made at page 427 of the same authority *viz*.. the assessor has no voice in his selection as an assessor and has little scope for exemption. Volens nolens he must act as an assessor being a citizen of the State for section 319 of the Criminal Procedure Code provides—All male persons between the ages twenty and sixty shall except as next hereinafter mentioned be liable to serve as jurors and assessors at any trial held within the District in which they reside." The learned counsel for the respondent maintained that according to the provisions of section 319 of the Criminal Procedure Code it is the liability of every citizen to serve as an assessor unlike an Oath Commissioner, who is appointed and selected of course not against his will. for administering oaths and verification of affidavits. The difference between the status of an Oath Commissioner and an assessor further more is that an assessor is only an officer of the Court during court hours, but has no office to work outside court, while in the case of an Oath Commissioner he is appointed for a year and is an officer at all times, entitled to work in court hours as well as out of court hours say at his residence. It was urged that the office of an Oath Commissioner is a continuity in office and he is an officer for administering oath as ordained under section 4 of the Oaths Act as well. The word "hold" moreover has significance of its own and as such the word "hold" connotes some volition and choice and has no application to the case of an involuntary act of a person imposed upon him under the law of the land. The assessor is merely subject to the statutory liability of being asked to do the duty of assisting the Sessions Judge in a sessions trial in a particular area of which he is a resident. The Code

of Criminal Procedure prescribes many duties to be performed by citizens to help the state in the administration of law and order. For instance under section 42 of the Code every person is bound to assist a Magistrate or a Police Officer reasonably demanding his aid in the taking or preventing the escape of any other culprit. It was maintained by the learned Advocate General that all this would indicate that a person required to do certain duties does not hold any office, position, power or advantage but is merely liable to render assistance to the State in the matter of law and order. The position in the case of the Oath Commissioner is manifestly quite different because an assessor while acting as such merely obeys the command of the court, but the Oath Commissioner seeks the appointment and on the recommendations of the Civil Judge is appointed by the District Judge, of course under the directions issued by the High Court.

The two cases of the members of the Legislative Assembly receiving monthly salary reported in 3 E.L.R., page 439 and 6 E.L.R., page 104 were also distinguished by the learned counsel for the respondent on the plea that a member of the Legislative Assembly does not hold any office of profit under the Government, since he is subordinate to the House and not to the Government. The argument was re-enforced that a member of the Legislature cannot be deemed to hold any office of profit under the Government, which was intended to disqualify the person either from being chosen or continuing to be a member of the legislature. The term "Government" as used in article 191 of the Constitution was intended to be synonymous in Part A States with the Governor and as such office of profit under Government means one under the Governor. It follows that in the case of all Government servants the powers are exercised by the Governor and in the case of Members of the Legislatures the disciplinary powers are exercised not by the Governor but by the Speaker. The other difference in such cases would be that it would mean that immediately after the election as soon as a member receives salary, he would become disqualified to sit and vote. It could never have been intended by the Constitution that a member elected to the Legislature should be disqualified immediately on election as soon as he receives salary. The learned counsel for the respondent concluded that the inevitable inference, therefore, would be that the disqualification mentioned in article 191 was not intended to refer to salary received by an elected member of the legislature and therefore such a member receiving salary is not one who holds an office of profit under Government.

The cases of Lambardars reported in 7 E.L.R. Page 203 and 3 E.L.R. Page 117 were also distinguished and the reason is not far to seek because their office is assignable and heritable while the characteristic of an office is that it cannot be made assignable or heritable.

The case of an honorary magistrate reported in 6 E.L.R., page 308 is a simple one, where no profit is attached with the office.

In the case of the Vice Chancellor of the University of Baroda reported in 1 E.L.R. page 171 it will be seen that the Vice Chancellor of the University of Baroda received an honorarium of Rs. 500/- per month from the funds of the University, but was appointed by the Government of Baroda and was liable to be removed from the office by the Government, it was held that she was disqualified under section 102(1) (a) of the Constitution for being chosen a member of the Parliament.

Shri Mishra while arguing and distinguishing the authorities relied upon by the learned counsel for the petitioner maintained that the office of the Oath Commissioner fulfils all the elements of an office and office of profit. It was argued that the oath commissioner stands on different footing as compared with the class of practising lawyer for the simple reason that it is not binding on the practising lawyer to continue his practice even after getting his enrolment certificate as a lawyer but in the case of an oath commissioner it is binding upon him to work under the instructions of the High Court for a specified period and charge a specified fee for the verification of affidavits. It was maintained that rule 539 of the General Rules Civil referred to by the learned counsel for petitioner is not in point in as much as when a lawyer enters into some service, trade or business or accepts any salaried appointment, he is suspended from practice, but that does not disqualify him from practice, if he wants to resume it. Shri Mishra on these premises, while distinguishing the authority relied upon by the petitioner's counsel, urged that in the case of the oath commissioner all the elements of an office exist namely that it is not assignable or heritable, it does exist even if the person ceases to exist, that there is a relation of master and servant between the Government and the Oath Commissioner in the matter of appointment and removal and it is an office of profit because emoluments are attached with it by way of charging specified fee as borne

out by the sworn testimony of D.W. 3 that the average income at Bharatpur is about Rs. 50/- per month. In this connection it was also argued that in the case of emolument it is not a pecuniary advantage but it is an advantage attached with the office and its quantum or amount is not material, if there is really a gain.

This brings me to another essential element of an office of profit as contemplated under article 102 of the Constitution. In this connection the learned counsel of both sides occupied the Tribunal for some time. The contention of the petitioner's counsel was that Government of India and Government of State were no where defined in the Constitution, but government is defined under section 47 of the General Clauses Act and 'Central Government' means the 'President' while 'Provincial Government' means the 'Governor'. It was stressed that Union means the Government having powers of executive, judiciary and administrative and similarly State means the Government having the powers of Executive, Judiciary, and Administrative, but the terms 'Union and State' are used in contrast to Government of India and Government of State which means only the Executive Government as contemplated under General Clauses Act. The argument precisely was that under article 102 of the Constitution the words used are 'Government of India or Government of State' and as such it relates to only Executive Government and does not embrace the functions of the High Court judicial and administrative work. The learned counsel for the petitioner urged that the underlying idea under article 102 of the Constitution for the purpose of disqualification is that the legislature may not be influenced by the Executive and as such the bar is for the executive and not for administrative work. The Executive powers are dealt with under article 154 of the Constitution and vested in the Governor and similarly article 77 of the Constitution deals with the executive powers of the Government of India and this indicates the executive Government and not the High Courts. The counsel inferred that the High Courts are under the direct control of the President and they are not under the Government of India and further more in their administrative work the High Courts are independant.

The learned Counsel for the respondent controverted the arguments of the petitioner's counsel and reference was made to various articles of the Constitution in respect of the appointments of judiciary in India including the Judges of the Supreme Court and the Judges of the High Courts and subordinate judiciary. It was argued that article 124 of the constitution deals with the appointments of every judge of the Supreme Court by the President and article 217 of the Constitution provides for the appointments of every Judge of the High Courts by the President in consultation with the Chief Justice of India and the Governor of the State. Similarly article 124(4) provides for the removal of the judges of the Supreme Court by the President and article 217(1) (b) provides for the removal of High Court Judges by the President. It was concluded that if a body was created by the Constitution as High Courts itself, any servant under the control of that body will be taken as servant of the Government. The High Courts are created under article 214 of the Constitution while Public Service Commissions and Central Advisory Committee of Auditor General are created under articles 215 and 148 respectively, and if the High Courts are independant as urged by the learned counsel for the petitioner, then all servants under Public Service Commissions and Central Advisory Committee of Auditor General, Legislature etc. shall be held independant of the Government and this would lead to an absurdity. Now the gist of the arguments of the petitioner's counsel, as stated above, is that the Administrative work of the High Court is independant of the Government of India and as such the office of the oath commissioner is not exactly in its service and cannot be called as an office of profit under the Government of India or Government of State. The sum and substance of the arguments advanced by the learned counsel for the respondent is to the effect that the High Courts on the administrative side are under the control of the Government of India because the appointments made in consultation with the Governor and where the appointments of the Oath Commissioners are made by the District Judges as in Rajasthan State it becomes all the more clear that the Government of the State has voice in the appointment. The next argument advanced by the learned counsel for the respondent was that if the High Courts and District Judges are held to occupy a position on the administrative side independent of the Government of India or Government of State, it would be open to the servants to stand for Assembly or the Parliament, which on the face of it looks preposterous; and if the petitioner's view prevails, then it would create an untenable situation.

Both sides relied upon the latest pronouncement of the Supreme Court in the case of Civil Appeal No. 335 of 1957 'Maulana Abdul Shakoor Versus Rikhab Chand Jain and another' which has not been reported but has been published in the

Government Gazette of India (Extraordinary) Part II Section 3 dated 14th October 1957, at pages 2496 to 2500. The question in respect of Government of India and the Government of State has been considered in this ruling, although the facts of the case relate to a committee of management of Dargah, which is a statutory body and has its own funds of Dargah endowment. This authority relate to two different positions, which the appellant Maulana Abdul Shakoor held under the management prior to 1950 when the appointments were to be made by the Government of India and subsequently when the management came to be vested in a Committee (which is a body corporate having perpetual succession and common seal and which can sue and be sued through its President). I think if the whole position is judged in the light of the dictum laid down in the Supreme Court case and the observations made therein it would be superfluous to elaborate this point with reference to all the articles relied upon by both sides, although those articles may furnish a clue to the guiding principle laid down by their Lordships of the Supreme Court in the aforesaid case. In this perspective it is desirable as well as necessary to place reliance on the dictum laid down in this case and to find as to whether that fortifies the view taken by the petitioner's counsel or the view adapted by the respondent's counsel.

Now the facts in this case namely Maulana Abdul Shakoor Versus Rikhab Chand Jain and another put briefly are—

That Maulana Abdul Shakoor filed two nomination papers on 28th February, 1956, and a third one on March 1, 1956. Rikhab Chand Jain also filed his nomination paper on March 1, 1956 and raised an objection to the validity of Maulana Abdul Shakoor's nomination papers. The main ground was that the appellant was holding an office of profit under the Government. The Returning Officer passed orders on March 6, 1956 and rejected the two nomination papers of Maulana Abdul Shakoor filed on February 28, 1956 but accepted the third i.e., of March 1, 1956 because according to that officer under the provisions of Dargah Khwaja Sahib (Emergency Provisions) Act 1950 (Act XVII of 1950) which was in force upto 29th February 1956 Maulana Abdul Shakoor was holding an office of profit under the Government but on the coming into force of the Dargah Khawaja Sahib Act (Act XXXVI of 1955) on March 1, 1956, he no longer held such office under the Government. The matter came up before an Election Tribunal by an election petition and the majority of the Election Tribunal by their order dated 31st January, 1957, held that on 1st March, 1956, Maulana Abdul Shakoor was holding an office of profit under the Government and therefore his nomination paper was hit by article 102(i) (a) of the Constitution and set aside his election. Disagreeing with the majority, the Chairman of the Election Tribunal held that on March 1, 1956 the appellant was no longer holding an office of profit under Government and his nomination paper was rightly accepted and his election was valid. The decision of the Election Tribunal came in appeal before the Supreme Court of India and their Lordships of the Supreme Court held that the previous Act of 1936 in relation to the Dargah was replaced by the Dargah Khwaja Sahib (Emergency Provisions) Act (Act 17 of 1950) and under section 3 of the act the Dargah Committee constituted under the act of 1936 was superseded and the management was vested in an administrator appointed by the Central Government who under section 7 was to be under the control of the Central Government, and had all the powers of the Committee constituted under the Act of 1936. That act continued to be in force upto February 29, 1956 and it was during its continuance that the appellant Maulana Abdul Shakoor filed two nomination papers on February 28, 1956 which were rejected by the Returning Officer.

The Act of 1950 was replaced by the Dargah Khwaja Sahib Act (Act XXXVI of 1955) and came into force on March 1, 1956. Under section 4(1) of this act the administration, control and management of the Dargah endowment came to be vested in a committee which is a body corporate having perpetual succession and common seal and which can sue and be sued through its President. Their Lordships held that the two nomination papers of Abdul Shakoor which were filed during the time when the old act was in force and there was no committee corporate for the administration of the Dargah, Maulana Abdul Shakoor, Manager of the Madarsa was for all purposes under the Government of India. After the replacement of the old act, which came into force on 1st March 1956, he was under the committee, which has its own administration, and was not holding any office of profit under the Government. In the result the appeal was accepted and the order of the Election Tribunal was set aside and the view adopted by the Chairman of the Election Tribunal and the order of the Returning Officer were upheld.

In the course of the discussion, their Lordships observed that the power of appointment and dismissal by the Government or control exercised by the Government is an important consideration, which determines in favour of the person holding an office of profit under the Government, but the fact that he is not paid out of the State revenue is by itself a neutral factor.

The question accordingly, as to what office of profit under the Government means, is crystallized in view of the dictum laid down by the Supreme Court in the aforesaid case. It will be seen that when Dargah was under the direct control of the Government, the manager of the Dargah was under the Government and when the management came into the hands or a committee corporate with its own succession, he was no longer treated as one holding an office of profit under Government. The argument of Sri Sharma, learned counsel for the petitioner while interpreting this authority of the Supreme Court in his favour was that High Courts and District Judges, by whom the oath commissioners are appointed are analogous with the position of the management of the Dargah and as such this ruling supports his view that the oath Commissioners are not holding an office of profit under Government. On the other hand Shri K. L. Mishra learned counsel for the respondent submitted that the committee of management, a corporate body was a legal person, which intervened between the Government and its employees holding an office of profit, while in the case of High Court Judges and District Judges, they are public servants of the Government of India or the Government of State and their appointments and removals rest with the Government. The argument was re-enforced that in this case where appointment of the oath commissioner is made by the District Judge, whose appointment is made by the Government with the consultation of the Governor under the law, it was idle to argue that the district Judge holds the position of a servant of a public body or corporation, created under statute as the committee of management of Dargah Khwaja Sahib was.

On the appreciation of the arguments of the learned counsel and the examination of authority cited for and against on this all important question I find that the word "Office of profit" denotes position and employment in the sense of having, a title attached to such employment and definite understanding and partaking of the nature and character of that master and servant and do not cover private and public bodies such as corporation, local bodies, committees under Religious Endowment Act etc. The principle moreover underlying is disqualification as to avoid conflict between private interest of a person and his duty as a member of the Legislature for as a member one needs to be independant in order to be able to properly represent the interest of the people whom he represents, so that interest in the office may not keep him beholden to the Government. It also appears that there is a difference between an office and an employment because every office being an office may be an employment, but there are employments, which do not come under the denomination of an office for the simple reason that office must possess existence independant of the incumbent as said above. Applying this principle it follows that when the committee of Dargah Khwaja Sahib Ajmer under the Endowment Act was functioning under the control of the Government under the Acts of 1936 and 1950 (which were replaced by an Act of 1955) upto 29th February 1956, the manager was held holding an office under the Government; notwithstanding of the fact that the management relates to a religious Endowment and was not a Government institution. But when the management came under the control of the committee constituted under the Act of 1955 and had its own succession, a legal person intervened between the Government and as held by their Lordships of the Supreme Court in the aforesaid case, the same manager was held not holding any office under the Government. The High Court or as a matter of fact the District Judge and its office by whom oath commissioners are appointed by no stretch of reasoning or imagination can be treated as a legal person intervening between the Government and having their own entity independant of the Government. The administrative machinery as borne out by various articles of the constitution requires approval of the Governor in the matter of appointment and if District Judge is admittedly holding an office of profit, those working under him having relation of master and servant shall be governed by the same disqualification.

Moreover the control of the Government is two fold (1) some of the services are directly under the control of the Government and as such any person in the service of Government holds an office of profit. There are other offices of profit which may not be directly in the service of the Government but they are under Government. The words used under article 102 of the Constitution are "under the Government of India or Government of State" and its amplitude and scope is wider than in the service of Government. Now the office of the oath commissioner

may not be in the service of the Government but it is under Government and as such their appointments and removals are to be made by the District Judge and their period of work is for a specified period under certain rules and regulations so much so that they have to give an undertaking for the performance of that work entrusted to them and they are answerable for that to the District Judge. Without incurring the risk of repetition it may be said that the office of an oath commissioner is independant of the person holding it and is neither heritable nor assignable and as such it satisfies all the requirements of an office. Further more certain pecuniary advantage is attached with it and in this case admittedly Shri Mukat was receiving certain fee for the verification and as such it was an office of profit. For all these reasons I am of the opinion that the oath commissioners hold an office of profit under the Government and are hit by the provisions of article 102(1) (a) of the Constitution.

The next part of issue No. 1 is 'whether Shri Mukat was not performing the duties of the office of the oath commissioner having not given the requisite undertaking in relation to the adjustment of timings of affidavit.'

As said above this objection was not taken before the Returning Officer, but two days after Shri Mukat in his affidavit Ex. P 4 dated 3rd February 1957 stated that he had not given the undertaking asked for by the time of scrutiny of the nomination papers and as such he could not be considered to have been appointed as an oath commissioner. This was the whole argument in respect of this part of the issue by the petitioner in his statement and by his learned counsel Shri R. C. Sharma in the course of arguments. The hard fact, however, remains that Shri Mukat admittedly was an oath commissioner for the years 1955, 1956 and 1957 and was acting as oath commissioner straightaway with effect from 1st January, 1957. The copies of affidavits verified by him in the month of January 1957 have been placed on record and Sri Mukat in his deputation admits that he was continuing to act as an Oath Commissioner and had actually verified the affidavits, but he was doing so under the impression that if such verification was not acceptable, he would be called upon. This attempt to qualify the statement to say the least is a clumsy attempt not to give the whole truth. Sri Mukat is a practising lawyer of some standing and it requires too much credulity to believe that he was not aware of his appointment. The appointments are normally made from the beginning of the year and take effect from first of January to 31st December while the undertaking as borne out from the files of 1955 and 1956 are made some time after. It appears that the undertaking is a formal matter as borne out from the sworn testimony of D.W. 3, Sri Dharam Gopal Chaturvedi, another oath commissioner working for the year 1957. Moreover, the undertaking is given after some time and takes effect from the date 1st January 1957 because it is not mentioned in that undertaking Ex. P3, given by Sri Mukat, that he had taken up the appointment from the date of the undertaking. It was also argued by the learned counsel for the petitioner that the order of the appointment was subject to the undertaking given by the oath commissioner for adjustment of their timings and "subject" means unless and until the undertaking is given. The dictionary meaning of "subject" is "to make liable or to cause to undergo". The word proviso appears to be a stronger term which conveys stipulation and as such it is abundantly clear that the word "subject" does not make the appointment void *ab initio* if the undertaking was not given. It was a formal matter and the undertaking as borne out from the files of 1955, 1956 and 1957 were given subsequent to the appointment, although when the work had already been taken up. In case of Shri Mukat who was an oath commissioner for the year 1956 and admittedly continued working for the year 1957, it becomes an accomplished fact that he took up appointment since 1st January and as such did not raise the objection of undertaking before the Returning Officer. To my mind where the question turns upon the acceptance of an office, dividing point of time is the fact of accentance and it is immaterial whether the complete form of appointment was communicated or was delayed. It is on the record that the renewal of the appointment of oath Commissioner was to take effect from the 1st January. The order of the District Judge is 4th January 1957 and the renewal is made for the year 1957 with effect from 1st January to 31st December 1957. Shri Mukat admittedly continued working as such as said above although intimation was received later, not only in his case, but in the case of other oath commissioners also and the undertakings were given subsequently. I, therefore, feel inclined to think that it was an after thought that certain affidavit was taken from Mr. Mukat in order to bolster up the case in the petition on this ground. I see no force in the objection with the result the issue is decided against the petitioner in both respects.

Issue No. 2.—This issue does not arise in view of the finding on issue No. 1.

Issue No. 3.—This objection relates to the provisions of section 55A of the Representation of the People Act, whereby the notice of retirement can be made not later than ten days before the actual date of the polling. In this case the notice of retirement by Shri Hansraj, one of the candidates, was given on the 15th of February 1957 when the date of first polling was 25th February 1957. The question arose as to whether it was made later than ten days. Shri Sharma learned counsel for the petitioner referred to the Interpretation of Statute by Mexwells 9th Edition Page 350 under the heading "Computation of time". The reference is to the terms "clear days" or "some many days at least" as well as "not less than" so many days to intervene. It was argued when such is the case both the terminal days are excluded from the computation. Now in this case the words used are 'not later than 10 days' and Shri K. L. Mishra learned Advocate General, contended that this is not the case where we are confronted with the terms "clear days" or "so many days" or "not less than so many days" and as such the interpretation referred to is not applicable. In this case the words used are 'not later than ten days' and according to computation the tenth day expired on the midnight of 24th/25th and computing it reversely 24, 23, 22, 21, 20, 19, 18, 17, 16, 15 would come to ten days. It was concluded that the notice of retirement was given 'not later than ten days' and as such there is no irregularity. The construction put by the learned Advocate General appears to be correct and the issue is negatived and is decided against the petitioner.

Issue No. 4.—This issue does not arise in view of the finding on issue No. 3.

Issue No. 5.—This issue was not pressed and was not argued by the learned counsel for the petitioner. It is however significant to note that this was the issue, which if proved, could materially affect the result of the election of the respondent, but as said above it was not pressed and does not require any discussion. Consequently even if issue no. 3 relating to the notice of retirement for the sake of argument be considered as one amounting to non-compliance of rule, the election was not materially affected under clause (d) (iv) of section 100 of the Representation of the People Act and as such all the three issues namely issues Nos. 3, 4 and 5 become ineffective and are decided against the petitioner.

The result is that the petition falls and is dismissed with costs which are assessed at Rs. 750/-.

ANNOUNCED.

KARTAR SINGH CAMBELLPURI, Member,
Election Tribunal, JAIPUR.

JAIPUR;
The 5th December, 1957.

[No. 82/427/57/770.]

By Order,
A. KRISHNASWAMY AIYANGAR, Secy.

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